

No. 14,993

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WILLIAM BERRYHILL,

Appellant,

vs.

PACIFIC FAR EAST LINE, INC.,

a Corporation,

Appellee.

}

**Appeal from the United States District Court for
the Northern District of California,
Southern Division.**

APPELLANT'S PETITION FOR A REHEARING.

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*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

Petitioner, the appellant above named, petitions for a rehearing of the above-entitled cause, and in support thereof alleges:

INTRODUCTION.

The opinion of the Court in this case is not only inconsistent with the decisions of like and related cases decided by the Supreme Court, but also clashes

with decisions of similar cases in other Circuit and District Courts.

This Court's affirmation of the judgment on the pleadings is an effective denial of a valuable right to which appellant is entitled. To remedy this injustice, the case should be reheard. Because of its broader implications the rehearing should be en banc, so that the circuit judges may consider the validity of appellant's contentions.

The facts although fully stated in appellant's brief, are restated, to emphasize the discussion of the applicable law.

On December 20, 1953, the SS FLYING DRAGON, a sea-going vessel owned and operated by the appellee, was docked for repairs at Todd Shipyards Corporation (hereinafter referred to as Todd), pursuant to a contract between Todd and the appellee. On that day, appellant, a marine machinist's helper, and others employed by Todd went aboard the vessel to make the necessary repairs to enable the ship to continue in the business of cargo carriage. Appellant was assisting a marine machinist to grind the vessel's "shaft keyway". In doing this repair work, the machinist used a grinding tool to which was affixed one of several available grinding wheels. The grinding tool itself was furnished by Todd and brought aboard the vessel by the machinist; the grinding wheels were on the vessel when appellant and the machinist reported aboard for work, having apparently been left there by machinists who worked the preceding work shift.

While the two men were grinding the shaft keyway the grinding wheel, affixed to the grinder, exploded and shattered. Fragments of the wheel struck and injured the appellant.

Appellant's complaint, as particularized by his answers to interrogatories propounded by appellee, alleges that his injuries were directly and proximately caused by appellee's failure to furnish him with safe and seaworthy tools with which to perform his work—specifically that the grinding wheel was unseaworthy. (Tr. 3-7, 16-20.)

Appellant, although employed by a shoreside ship repair yard is a marine machinist. At the time of his injury, we contend he was doing "ship's work", within the ambit of precedent judicial acceptance of the meaning of this phrase.

The Supreme Court decisions of the *Sieracki*, the *Hawn*, the *Petterson*, and the *Rogers* cases have already been reviewed in earlier briefs. Appellant has apparently failed to convince the Court that they do apply. Other cases (repairs of vessels while in dry dock) and specifically to the point of the instant case, will be reviewed below.

This Court found, as a fact, that appellant seeks redress for his injuries, sustained during repairs to the "shaft keyway" of the vessel, "when a grinding wheel, owned and furnished by appellant's employer, Todd Shipyards Corporation, shattered or disintegrated while the SS FLYING DRAGON, owned by appellee was docked for repairs." (238 F.2d 385.)

The "shaft keyway" is a device to keep the ship's propeller from turning on the shaft. Sometimes also referred to as a "shaft tunnel or shaft alley", it is a watertight passage housing the propeller shafting from the engine room to the bulkhead at which the stern cube commences; it provides access to the shafting and bearings and also prevents any damage to it from cargo in the space through which it passes. The "shaft keyway" which is used to connect the propeller of the shaft, consists of longitudinal grooves cut into the shaft itself, and also into the propeller. The key itself is shaped like a half moon and fits into the groove on the shaft and the upper part of the key fits into the groove in the propeller, thus preventing the propeller from rotating freely on the shaft. It connects with the shaft tunnel or shaft alley.

In considering this petition, the Court may find it helpful to requisition of the parties some visual demonstration of the shaft keyway, in which event both sides can agree to furnish the Court with the builder's block diagram, drawings, blueprint, or perhaps a photograph of the device involved herein. It will thus be apparent that the appellant, when injured by the exploding grinding wheel was doing the simplest kind of "ship's work" as defined by the Supreme Court in *Sieracki*, and all subsequent cases decided by the federal Courts at all levels, throughout the Circuits.

Longshoremen, ship cleaners, and shipyard repairmen have already been afforded the *Sieracki* doctrine rights. No basic distinction has ever been made, particularly in the Supreme Court, that the repair work

which is involved is small or great. The principle of law involved is that this type of work would normally or historically have fallen to the lot of the seaman. In the old days, the seaman used to sew the sails and clean the hulls and do everything on board the ship that was necessary.

Before the era of "increasing commerce and the demand for rapidity and special skill" (*Atlantic Transport Co. v. Imbrokev, supra*, 234 U.S. 52, 61, 58 L. Ed. 1208, 1213) virtually all of the ship's work was performed by the ship's crew. The traditional protections afforded the crew extended equally to the work of loading, unloading, repairing and refitting the vessel and were equally applicable whether the ship was at sea or in port. Upon proper performance of the work, whether navigational or non-navigational in character, depended in large measure the safe carrying of passengers and cargo and the safety of the ship itself. It was a service absolutely necessary to enable the ship to discharge its maritime duty. The ship was bound to furnish the crew with a reasonably safe place to work, and a safe and seaworthy vessel, an obligation which encompassed within its scope the diverse procedures involved in loading, unloading, repairing and refitting the vessel. As the need for specialization increased, shipowners developed the practice of hiring men for the specific purpose of tending to these non-navigational phases of the vessel's enterprise. This included contracts made with shipyards for all types of repairs aboard the vessel. In so doing the ship-owner did not relieve himself of his traditional obliga-

tions, for these men, though not members of the crew, were doing precisely the work of the crew, as necessary to the accomplishment of the ship's enterprise as navigation itself. Rightly these men looked to the vessel for the safe accomplishment of their work.

In these modern days, breakdowns at sea and even in port are not at all unusual. The licensed engineers and others in the engine room of a vessel, repair whatever has to be done in the vessel, even to the point of making a major repair in the engine room, to the largest as well as the smallest structures on board. In other words, everything on board the ship historically was always taken care of by the seaman, so far as repairs are concerned. The shipyard, with respect to the work which engine room craftsmen perform—a machinist in the instant case—is just as much an innovation, as the growth of longshore and stevedoring activities, and the development of those categories of specialized labor with which *Sieracki*, *Hawn*, *Petterson* and *Rogers* were concerned.

The triad of Supreme Court cases, *supra*, since *Sieracki*, in principle, entitles the appellant to maritime" rights spelled out in those cases for personnel other than seafaring men. Moreover, Courts of Appeal and District Courts, interpreting these cases, have conferred rights which appellant here seeks, to shore-side workers, on vessels, in dry dock, at a shipyard (as here), doing the kind of "ship's work" which appellant was doing when he was hurt.

Indeed the United States in at least one case (*infra*), which has come to our attention, conceded in

a brief recently filed with the Supreme Court that an electrician employed by a ship repair company who was injured while the vessel was "high and dry in a shipyard for purposes of improvement and overhaul, * * * is of course entitled to a *seaworthy* ship * * *"
(Emphasis supplied.)

THE OPINION OF THE COURT WHICH DECIDED THIS CASE, CONFLICTS WITH SUPREME COURT DECISIONS IN THIS FIELD, AS WELL AS WITH RECENT DISPOSITIONS OF COURTS IN OTHER CIRCUITS.

Lester v. United States, No. 373, United States Supreme Court, October 1956 Term, is four square with the instant case. Certiorari was granted on November 5, 1956, to review the remand by the Court of Appeals (234 F. 2d 625, C.C.A. 2, 1956), which directed the District Court to dismiss the libel. Lester, a shoreside electrician, employed by a ship repair yard, was injured during the course of his work, while the vessel was "high and dry in the No. 2 dry dock of Marine Basin Co." on which day the vessel, owned by the United States "was undergoing a *general overhaul* by Marine Basin". (234 F. 2d 625-626.)¹ (Emphasis supplied.) The District Court for the Eastern District of New York (127 F. Supp. 413), found for libelant on the unseaworthiness statement of claim but denied relief on the negligence count. The Court of Appeals (pp. 627-628) refused to adopt the District Court's rationale which led it to find unseaworthiness. Had the Court of Appeals been of the

¹The analogy to our case is obvious.

opinion that the warranty of seaworthiness did not apply in the *Lester* case, it would certainly have said so, as an additional reason for reversing the trial judge.

The Court did in fact consider the issue of unseaworthiness, raised by the pleadings and found that it applied. It found, however, on the facts, that the vessel was not unseaworthy, stating at page 627:

“Since we hold on the basis of the undisputed facts and the facts found by the trial court, that the Q-100 was not unseaworthy, it will be unnecessary for us to consider the questions raised relating to damages and indemnification.”

The Government in opposing certiorari, did not oppose it on the ground that the warranty of unseaworthiness does not apply in such a situation. It was of the view, as was the Court of Appeals, that the doctrine of seaworthiness was applicable. In the brief of the United States in opposition to the petition for certiorari in the *Lester* case, the Government had this to say at page 8:²

“In this case, the accident underlying the litigation occurred on a clear day while the Q-100 was high and dry for purposes of improvement and overhaul. While engaged in the overhaul * * *

²Reference to the Government's brief is based upon a communication received from eastern counsel in the case. We have unsuccessfully endeavored to locate a copy of the brief in San Francisco. Since this petition for rehearing is now due, time does not permit for air mail correspondence to obtain a copy of it before the petition will be filed. We have telephoned counsel in that case for copies for immediate delivery to the Clerk of the Court and to counsel for appellee.

Under the decisions of this Court,⁶ *petitioner, a shore based electrician, is of course, entitled to a seaworthy ship* which means that the ship must be reasonably fit but not that it can 'weather all storms.' *Boudoin v. Lykes Bros. SS. Co.* 348 U.S. 336, 339. The Q-100 clearly met this test. Petitioner was provided 'with a motionless, unobstructed, and virtually level canvas-covered surface from which (he), an experienced dry dock worker, could * * *' (Emphasis supplied.)

⁶"*Seas Shipping Co. v. Sieracki*, 328 US 85; *Pope & Talbot, Inc. v. Hawn*, 346 US 406; *Alaska SS Co. v. Pettersson*, 347 US 396."

Thus did the Government clearly present to the Supreme Court of the United States in the *Lester* case the legal view that a shore based worker is entitled to a seaworthy ship which is "high and dry for purposes of improvement and overhaul". Thus, also, did the Supreme Court, by not disavowing the Government's version of the law on this subject, indicate its approval thereof, in its grant of certiorari.³

Imperial Oil, Ltd. v. Drlik, 234 F. 2d 4 (C.A. 6, 1956), cert. den. 352 U.S. Advance Sheet No. 3, page 941. The Court of Appeals had affirmed the District Court, but reduced the award for excessiveness. *Drlik*, like *Lester*, *supra*, and like *Berryhill* in the instant case, was a shoreside worker in the employ of a shipyard which was engaged in the repair of a vessel on

³We have been informed on February 7, 1957, by counsel in the case, that the *Lester* case is now fully disposed of. The government paid the full amount of the judgment rendered in the District Court, plus interest and costs.

drydock. He was injured in the course of the repairs being made to the vessel.

In the case at bar, the Court apparently regarded the nature and extent of the repairs of some significance, when it said:

“In the instant case, the repairs were nothing of an improvised, hurried nature, done to save the ship’s work time, but were of sufficient importance to cause the ship to be drydocked” (238 F. 2d 387.)

It is to be noted, however, that the same was true in *Lester* and *Drlik*, both, *supra*. In the latter case *Drlik*, having succeeded in the District Court and the Court of Appeals, also successfully resisted certiorari. The Supreme Court, in denying certiorari, had before it the following description of the work:

“The Imperial Leduc had been materially damaged as the result of an explosion and fire, and at the time of the accident on August 8, 1952, was being repaired by the American Ship Building Company at its Toledo, Ohio, Yard. Appellee was an employee of the American Ship Building Company. The vessel was in drydock preparatory to being undocked for removal to an adjacent pier to complete repairs. She was headed bow in, with four of her mooring cables running from winches on her deck to spiles located ashore, which held her in a proper position while the drydock was being flooded.” (234 F. 2d at p. 7.)

Neither of the foregoing Courts of Appeals finds, nor does the Supreme Court find that the nature or extent of repairs are material to the question whether the

doctrine of seaworthiness is to be extended to a ship-yard worker.

The libel in *Drlik*, supra, was in two counts: (1) unseaworthiness under the General Maritime laws and (2) for general negligence. The Court of Appeals found that Drlik was entitled to the warranty of seaworthiness. It considered the question of the seaworthiness of the vessel, but found from the facts that the claim of unseaworthiness was not established. On the subject, the Court stated, at page 8 of 234 F. 2d:

“The admiralty rule that the vessel and its owner are liable to indemnify a seaman for injury caused by unseaworthiness of the vessel or its appurtenant appliances and equipment has been the settled law since the Supreme Court’s ruling to that effect in *The Osceola*, 189 US 175, 23 S. Ct. 483, 47 L. Ed. 760. *Mahnich v. Southern SS Co.*, supra, 321 US 96, 64 S. Ct. 455, 88 L. Ed. 561. The rule has lately been extended to stevedores and others doing a seaman’s work and incurring a seaman’s hazards, although not in the employ of the owner of the vessel. *Seas Shipping Co. v. Sieracki*, 328 US 85, 66 S. Ct. 872, 90 L. Ed. 1099. *Pope & Talbot Inc., v. Hawn*, 346 US 406, 412-413, 74 S. Ct. 202, 98 L. Ed. 143; *Alaska Steamship Co. v. Petterson*, 347 US 396, 74 S. Ct. 601, 98 L. Ed. 798. *Appellee would fall within the protection of the rule so extended.* However, in the present case there was no evidence that the vessel or any part of her equipment was defective.” (Emphasis supplied.)

The Court did find that the vessel was negligent.

We agree with this Court's statement at page 386, "The dissent (in the *Petterson* case) points out that the majority affirmance in *Petterson* goes one step further than *Sieracki* and *Hawn* cases, in holding that the equipment which causes the injury need not belong to the shipowner nor be a part of the ship's equipment."

In fact, a critical analysis of the dissenters' views in *Petterson*, leaves no room for doubt that the factors considered there, fit the appellant herein, so that he, too, is entitled to the warranty of seaworthiness.

We respectfully disagree with the Court in its step-by-step rationale, following the above quotation, which then leads it to what we earnestly believe to be an erroneous conclusion.

For example, at page 38, this Court states:

"The Courts have recognized the distinction between the protection required by a seaman, and one who works on a ship cradled on dry land. The very reason for the rule of absolute liability ends,¹ when the vessel is not on water. As the appellee here points out, a district court said in *Manera v. United States*, 124 Fed.Supp. 226 (E.D. N.Y. 1954):

'Since he was not a seaman and was not exposed to the peril of descending from the 'tween deck into the lower hold while the ship was rolling or pitching on the high seas, the test to be applied

¹"See:

Myers v. Pittsburgh Steamship Company, 165 F.2d 642 (1948);
 Guerrini v. United States, 167 F.2d 352 (1948);
 Martini v. United States, 192 F.2d 649 (1951);
 Manera v. United States, 124 Fed.Supp. 226 (1954)."

was that of what a business guest would be entitled to exact from the ship while in the performance of such a task as he was engaged in while the ship was lying at this repair yard dock. It is believed that the foregoing is a correct statement in view of all that was written in *Pope and Talbot v. Hawn*, 346 U.S. 406 (Brief for Appellee, p. 9).'"

Several observations are in order:

(a) As to the statement that "the very reason for the rule of absolute liability ends when the vessel is not on water", it is respectfully submitted that cases cited, *supra*, show that whether the vessel is on or out of water is not controlling.

(b) The reasoning of the *Manera* case, which this Court apparently adopts, that the absence of the traditional hazards at sea, as a reason to deny the warranty of seaworthiness to shoreside employees, is invalid, because:

1. The District Judge writing in *Manera*, relied on *Hawn* as justification for his views. But this was the very argument of the dissenters in *Hawn*, which must be deemed inappropriate since it obviously did not persuade the majority of the Supreme Court.

2. The *Manera* case was decided in September, 1954. It relied on *Hawn*, decided by the Supreme Court in December, 1953. However, in the meantime, *Petterson* was decided by the Supreme Court in April, 1954. Mr. Justice Burton, writing for the dissenting view in the *Petterson* case, and by referring to the *Hawn* case, catalogued (by reference) the many haz-

ards and restrictions of the seafaring man, as contrasted with the work of a land-based worker, as reason why the shoreside employee should not be entitled to the seaworthiness warranty. Mr. Justice Burton stated, at page 864 of 1954 A.M.C.:

“The historical analogy (as to seaman’s hazards) disappears in the instant case. The modern stevedores, who supply substantial loading equipment, are a far cry from the traditional wards of the admiralty around whom the Court threw its protection in the *Osceola* case.⁵

⁵For a statement of the contrast between the traditional wards of the admiralty and modern longshoremen, see dissent in *Pope & Talbot v. Hawn*, 346 U.S. 406, 423-426 * * *.”

In the earlier *Hawn* case, to which Mr. Justice Burton refers, the contrast of hazards between men at sea and ashore is discussed as follows:

“Contrast the lot of this plaintiff (Hawn) who lived at home, was free to leave his employment, took no risks at sea, and had no different conditions or hazard attached to his employment than would have attached to a carpentry job in a building ashore.” (1954 A.M.C. 18.)

In both the *Hawn* and *Petterson* cases, the minority sought to persuade the majority of the Court, unsuccessfully, that because the hazards and disciplines of men at sea are greater than those to which shoreside workers are subjected, that therefore the latter should not benefit by the warranty of seaworthiness. So that within four months, the Supreme Court twice rejected that argument, and extended the doctrine of seaworthiness to men who work ashore. The *Maneri*

case, which this Court has cited, is therefore not a precedent for this point.

The cases cited by the Court in the footnote on page 337 of its decision are inapplicable. As to

(1) The *Meyers* (1948) case—The suit, by a shipyard worker, was not brought for a breach of the seaworthiness warranty. The injury occurred on a shipyard dock. The Court recognized the validity of *Sieracki*, but pointed out that the *Meyers* suit was brought for negligence only. In its dicta, the Court conceded that if the action had sought relief for a breach of the seaworthiness guarantees, it would probably have to be extended to a case like *Meyers*. Furthermore, the case was decided three years before the *Hawn* and *Petterson* cases were decided by the Supreme Court.⁴ Hence, there would have been no question of the applicability to *Meyers* of the doctrine settled by the Supreme Court.

(2) The *Guerrini* (1948) case—The Court denied the doctrine of seaworthiness to an injured shoreside ship's boiler-cleaning man. In discussing *Sieracki*, the Court refused to extend the *Sieracki* doctrine to *Guerrini* because the Court felt bound to apply it only to stevedores engaged in "loading and unloading cargo." Judge Learned Hand conceded that *Sieracki* would probably have to be extended to the kind of shoreside

⁴*Rogers v. U. S. Lines*, 347 U.S. 984, heretofore referred to was also decided by the Supreme Court in 1954. It gave the *Rogers* case the summary, short shrift, which it deserved, i.e., "The petition for certiorari is granted and judgment reversed", thus affording *Rogers* (a longshoreman) the benefits of the seaworthiness warranty.

worker involved in the *Guerrini* case,—a prediction borne out by decisions subsequent to *Guerrini*.

(3) The *Martini* (1951) case—Also involved an employee (general superintendent) of a shoreside repair company. The Court relied on *Guerrini*, already discussed above, as a precedent.

(4) The *Manera* (1954) case—Has already been reviewed, *supra*.

Finally, this Court states, at pages 387-388 of its opinion, that:

“The appellant has his statutory remedy against the employer [Longshoremen’s and Harbor Workers’ Compensation Act, 33 U.S.C. § 901, et seq.].”

This expresses the unavailing dissenting views, specifically expressed by the minority in the *Petterson* case (1954 A.M.C. at page 865), and inferred by the dissenters in *Hawn* (1954 A.M.C. at page 17). If, as we maintain, appellant is entitled to the warranty of seaworthiness, it should be of no significance, that he may be, in these circumstances, entitled to what may properly be described as an *alternative* benefit guaranteed under the Longshoremen’s and Harbor Workers’ Compensation Act, 33 U.S.C. § 901, et seq.

CONCLUSION.

We have examined the several errors in the opinion of the Court. We have tried to point them up, in order to restore to appellant the valuable right which

has been denied to him by this Court's affirmance of the judgment below. We believe that the opinion of this Court in the instant case conflicts with the spirit of the law by the Supreme Court in the cases reviewed in this petition. It certainly is counter to the views of the Court of Appeals of at least two other Circuits.

In these circumstances this petition for a rehearing should be granted, and it should be heard en banc.

Dated, San Francisco, California,

February 8, 1957.

Respectfully submitted,

DARWIN & PECKHAM,

By JAY A. DARWIN,

*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above-entitled cause. In my judgment the foregoing petition for a rehearing is well founded in law and in fact. I further certify that the petition is not interposed for delay.

Dated, San Francisco, California,
February 8, 1957.

JAY A. DARWIN,

*Of Counsel for Appellant
and Petitioner.*